

**Annual Address:**  
**State of the Judiciary**

October 26, 2017

Great Hall, John Adams Courthouse  
Boston, Massachusetts

*Remarks by*

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Chief Justice of the Supreme Judicial Court

Each year, as I stand before you to reflect on what we have accomplished and what we hope to achieve, it is appropriate to begin by expressing my thanks to the men and women whose hard work and dedication to the rule of law and the provision of justice with dignity and speed sustain the Commonwealth's courts: judges and justices, clerks, court officers, probation officers, court facilities employees, and administrative staff. We accomplish nothing worthwhile without you.

I also give thanks every day for the leadership of Chief Justice Paula Carey, Court Administrator Jon Williams, and the chief justices and deputy court administrators of our seven Trial Court departments; and for the fellowship of our appellate justices. I am grateful for the close collaboration we in the judiciary have enjoyed with the leadership of the Massachusetts Bar Association, most recently with President Chris Sullivan and Chief Operating Officer and Chief Legal Counsel Marty Healy; with the leadership of the Boston Bar Association, most recently with President Mark Smith and Executive Director Rich Page; and with the leaders of the other regional and affinity bar associations. I appreciate the countless contributions of the private bar to making our justice system function more fairly and effectively, whether through pro bono work, committee service, or public advocacy. I recognize how fortunate we are to have legal services attorneys, prosecutors, assistant attorneys general, and CPCS attorneys who do so much important legal work for so little pay. And I am immensely thankful for the support of our friends and partners in the Legislature -- most prominently, Speaker DeLeo, Senate President Rosenberg, Ways and Means Chairs Sánchez and Spilka, and Judiciary Chairs Cronin and Brownsberger -- and in the Executive branch -- most prominently, Governor Baker, Lieutenant

Governor Polito, and Chief Legal Counsel Lon Povich. I speak to Chief Justices throughout the country, so I appreciate what a great blessing it is to have legislators and a governor who understand what we do in our courts, who share our commitment to solving the problems that bring people to court, who are willing to listen and to be guided by the facts, and who work with us in the spirit of collaboration, collegiality, and mutual respect to further the cause of fair and equal justice.

I have served in the Massachusetts judiciary for nearly a generation and, with the 325th anniversary of the SJC approaching next month, I am mindful that we stand on the shoulders of the fine judges, clerks, and staff who have served before us; each generation bestows its legacy on the next. But I think it fair to say that our judiciary today has never been more thoughtful, more willing to explore better ways to do things we have always done, and more focused on addressing the problems that plague our Commonwealth, including opiate use disorder, youth violence, mental health issues, homelessness, child neglect, and intimate partner abuse. I am proud of what we have already accomplished, but I know that we have the talent, will, and commitment to do even more in the future. So let me now take stock of where we stand, what we have done, and what we still need to do.

You may remember that last year I spoke about the reasons for expanding the Housing Court to every corner of the Commonwealth. On July 1, thanks to the leadership of Speaker DeLeo, Senate President Rosenberg, Senator Spilka, and Representative Walsh, the benefits of a Housing Court were brought to every resident of Massachusetts. It is no easy task to implement this major expansion in just a matter of months. Chief Justice Tim Sullivan, Deputy Court Administrator Paul Burke, and the remarkable judges, housing specialists, clerks, and staff of the Housing Court simply make it look easy. I thank them for their extraordinary efforts.

We currently have 26 drug courts, three juvenile drug courts, and one family drug court; seven mental health courts; five veterans treatment courts; two homeless courts; and a family resolutions specialty court. Unlike the Housing Court, these courts are not separate departments, but specialized sessions within existing Trial Court departments. Still, it takes additional funding to support them and, in particular, to pay for the clinicians and probation officers who staff them. I hope that in the future we will be able to continue to expand these specialty courts so that, as is now true of our Housing Court, they will be available to all who need them, wherever they live in the Commonwealth -- especially our drug courts, which are so desperately needed at a time when we are losing more than five people every day to opioid overdoses.<sup>1</sup>

The Governor declared last Thursday to be Conflict Resolution Day, and I appreciate his recognition of the day as part of Conflict Resolution Week. That same Thursday, at a wonderful event in this building sponsored by the MBA Dispute Resolution Section, I declared -- albeit without the fanfare of a formal written proclamation -- that every day in our courts is conflict resolution day, because that is what we do each and every day in all of our civil courts. At that event, it was noted that modern alternative dispute resolution began in Massachusetts in the 1970s, with our Trial Court's embrace of Professor Frank Sander's concept of a Multi-Door Courthouse. Professor Sander coined the phrase "Let the forum fit the fuss," and I know of no better description of what we are trying to accomplish in our courts to resolve conflicts more fairly, more efficiently, and more amicably. No longer does one size fit all; the Land Court, Probate and Family Court, and Superior Court have all developed a menu of litigation options that allow parties to resolve their conflicts in a manner that best fits their particular case. The challenge now is to get attorneys and litigants to make use of those options. I am grateful to the bar for all the pro bono hours you have devoted to help resolve the conflicts that come to our

courts through mediation, conciliation, arbitration, and case assessment, especially in our Probate and Family Courts; you touch so many lives when you do so. And our District Court and Boston Municipal Court have created specialized civil sessions to ensure that civil cases in these courts get the time and attention they deserve, so that they can be resolved in a cost-effective manner appropriate to the amount of money at issue. We will be closely monitoring the success of these specialized civil sessions and will be conferring with the bar before any decision is made to increase the procedural limit in the District Court and BMC from \$25,000 to \$50,000.

We cannot discuss the challenge of making the provision of justice more efficient without also discussing our need to get up to date in our use of information technology. We are working toward becoming a court system where nearly all filing is e-filing; where attorneys and self-represented litigants receive electronic or text reminders of court dates; where the court file is digitally available to the judge and to all parties in a case; where judges can quickly access every document in a case, whether they are on the bench, in a lobby conference, or at their desk writing an opinion; and where judicial orders and opinions are transmitted immediately and electronically. We are making progress toward this goal. In the Appeals Court, approximately 85% of criminal briefs and 65% of civil briefs are now filed electronically, and as a result, most Appeals Court justices spend far more time reading briefs on their iPads than on paper. In the SJC, 85% of applications for direct and further appellate review are now filed electronically. And e-filing and other digital projects are now proceeding apace in the Trial Court, as you will hear from Jon Williams. In fact, the Land Court is even working with the Registers of Deeds Association and the Secretary of State to initiate a pilot program that would permit the e-filing of documents for registered land.

We need to make better use of video conferencing, whether through Skype on a computer or FaceTime on a smartphone, or sometimes simply with conference calls, to reduce the number of times that attorneys and parties need to appear in court. Thanks to the Legislature, we now have video conferencing capabilities in every courthouse and on every Trial Court judge's laptop. We now conduct close to four thousand video events each quarter, and the number is growing daily. We also need to explore whether in some cases, most likely small claims and civil motor vehicle infractions, we can reach a fair resolution without ever asking the litigants physically to come to court. Not every matter and not every motion justifies the time, cost, and burden of traveling to court. And when people do need to come to court, we must be more respectful of their time through staggered scheduling to avoid long waits. If lawyers cannot resolve court matters efficiently, then even fewer litigants will be able to afford lawyers.

Last spring, the Juvenile Court, Superior Court, District Court, and BMC adopted best practices in sentencing intended to ensure that each defendant receives an individualized sentence that takes into account the gravity and circumstances of the crime, the impact on the victim and the victim's needs, and the defendant's criminal history and treatment needs. Two fundamental principles emerge from these best practices. The first is a variation on the Hippocratic oath taken by every physician: not "do no harm," because every just sentence inevitably harms the defendant and his or her family, but do no needless harm -- that is, do not impose a sentence longer than justice requires. The second principle is that, in imposing conditions of probation, less is more: a judge should identify which conditions are necessary to reduce the defendant's risk of committing new crimes, and impose only those, because needless conditions simply increase the burdens of probation and the risk of probation revocation without having any beneficial effect on public safety.

Our focus on the importance of individualized sentencing decisions inevitably focuses attention on the statutes that are the greatest impediment to sentences that fit the crime and the offender: mandatory minimum sentences. In a prior State of the Judiciary address, a very wise Chief Justice of the SJC said, "I opposed then and continue to oppose a system of mandatory sentencing totally eliminating judicial discretion to consider mitigating and aggravating circumstances." That wise Chief Justice was not me (the reference to "wise" should have made that clear); it was Chief Justice Edward Hennessey in his State of the Judiciary address in 1980.<sup>2</sup>

A few months ago, the esteemed attorneys and judges of the American Law Institute joined Chief Justice Hennessey's call for an end to mandatory minimum sentences when the ALI adopted a new Model Penal Code of Sentencing at its annual meeting in May. Every time a judge imposes a sentence higher than the judge thinks just because of a mandatory minimum sentence or, more likely, because of a plea to an agreed-upon disposition chosen by the prosecutor as the price for dropping the mandatory minimum charge, the principle of "do no needless harm" is violated. School zone mandatory minimums in drug cases are the most random of the mandatory minimums, because they depend solely on the proximity of the defendant to a school or park at the time of arrest, regardless of whether the defendant had any intention of selling to anyone on or near school or park grounds. I am sure that Chief Justice Hennessey would be grateful that the Legislature this year is taking a hard look at the wisdom of mandatory minimum sentences.

As for the broader debate regarding criminal justice reform that is now underway in the Legislature, I can keep my remarks brief because so much has been said so well by the bar associations. Last spring the MBA's Criminal Justice Reform Working Group issued a report

that, among other topics, clearly and carefully articulates the importance of considering defendants' ability to pay in setting bail and in assessing criminal fines and fees, or in authorizing their waiver. Last month, the Boston Bar Association Criminal Justice Reform Working Group issued its report, "No Time to Wait: Recommendations for a Fair and Effective Criminal Justice System." This 74-page report, clearly written, thoroughly researched, and carefully considered, comprehensively describes the urgent need for reform. These reports should be required reading for anyone considering the question of criminal justice reform in Massachusetts.

I will focus on the fundamental takeaway from the research conducted by the Council of State Governments: effective criminal justice reform will reduce the crime rate, not increase it. According to CSG, 48% of those released from houses of correction and 38% of those released from state prison in Massachusetts were reconvicted within three years of their release.<sup>3</sup> The lesson learned from CSG is that, if we can reduce this rate of recidivism, we can reduce the rate of crime. And we can reduce this rate of recidivism by providing drug treatment, mental health treatment, and cognitive behavioral therapy to those who presently cannot get this treatment in our prisons and houses of correction. We can reduce this rate of recidivism by giving defendants reasonable incentives to seek such treatment, such as earned good time and parole. We can reduce the rate of recidivism by reducing the degree to which a criminal conviction makes it harder to keep a driver's license, or get a job, or obtain further education, or find stable housing. We can reduce the rate of recidivism by diminishing the financial burden of fees and fines that sit like an albatross on the shoulders of those struggling to make a living and pay child support, and by allowing our probation officers to focus on rehabilitation rather than bill collection. We can reduce the rate of recidivism by taking the high risk 18-24 year old adults, whose recidivism rate is the highest of any age cohort,<sup>4</sup> and enrolling them in post-release programs with a

demonstrated rate of success, as Chief Justice Carey will discuss. If we take these steps, then we can finally make a dent in that persistent recidivism rate and reduce the overall crime rate. But if we continue to allow many defendants to leave our prisons and houses of correction with untreated drug and mental health problems, with no job training or job experience, and then continue to place obstacles in their way when they try to find lawful employment, we can be sure that they will still find work; it might just not be the work we want them to find. Because, as one formerly incarcerated defendant noted at a recent MassINC forum, "The streets are always hiring."<sup>5</sup>

We have all heard the objections:

"We will be releasing violent criminals and drug dealers." But they will inevitably be released; we cannot lock them up forever, nor can we afford to. The question most relevant to crime reduction is what will they do when they return to the street? And if convicted criminals have earned early release by doing everything we want them to do behind bars, why would we not reward that behavior by giving them earned good time and the possibility of release on parole?

"We are 49th among the states in our rate of incarceration; we've gone as far as we can safely go." But we incarcerate four times as many people today as we did 40 years ago, at a time when our crime rate was about the same.<sup>6</sup> And our focus is less on reducing the length of sentences than it is on reducing needlessly long sentences and, once sentenced, on giving prisoners the opportunity to shorten their sentence if they do the things we want them to do while incarcerated to improve their likelihood of success when they get out.

But civil and criminal justice reform are not our only challenges; there are at least two others we are actively engaged in confronting. The first involves the daily challenges confronted by judges in our Probate and Family Court. The judges in our Probate and Family Court are deeply committed to helping families in need address the complex problems that bring them to court. And, under the leadership of its Chief Justices, Paula Carey and now Angela Ordoñez, the Probate and Family Court has been wonderfully inventive in finding ways to leverage our scarce

judicial resources to do its work: limited assistance representation began in the Probate and Family Court; the court was the first to use the volunteer attorneys in retired Judge Edward Ginsburg's terrific program, Senior Partners for Justice, to provide pro bono legal assistance; and no court has been more aggressive in developing mediation and conciliation programs. But yet, the work load continues to be overwhelming. As a result, Probate and Family Court judges are retiring before age 70 at the highest rate of all our Trial Court departments, and younger judges are running at a pace they cannot reasonably sustain.

When you think about it, it is not hard to see why this is happening. The judges charged with resolving Family Court disputes -- alimony, property division, child custody, and guardianship -- must understand not only a single transaction or event, but each family's entire history, including the relationship between the spouses, their abilities as parents, and the needs of their children or, in some guardianship cases, the needs of an elderly parent or a drug-addicted adult child. The judges must also determine each family's income, assets, and potential financial resources, including their capacity to earn. And in the vast majority of cases, they need to figure out all these issues when at least one party is without the assistance of counsel. In no other court do we have so many self-represented parties being asked to litigate disputes as complex, as emotional, as enduring, and as life-changing, as in the Probate and Family Court. The challenge of proceeding without the benefit of counsel is illustrated by the routine questions a clerk will ask a spouse seeking a divorce: "Where are the Rule 401 Financial Statements? Do you have a signed written Separation Agreement? Have you prepared a written parenting plan and used the child support guidelines to determine child support? Have you taken the mandatory parenting course?" Add to this challenge the substantial burden of issuing written decisions in every divorce case, where they are required, <sup>7</sup> all with a shortage

of law clerk help due to budget cuts. And even after the judge issues a decision, the litigation rarely ends, because the parties frequently return seeking modifications based on changes in circumstances, and the cycle starts all over again. The burdens we place on our Probate and Family Court judges are simply not sustainable; we need to reimagine how we do justice in our Probate and Family Court.

And we are in the process of doing so. Chief Justice Carey and Chief Justice Ordoñez have already begun that process, and they have each been immersed in the work of this court for more than thirty years. And I, with the support of Chief Justices Carey and Ordoñez, have done what I have always done as a Justice of the SJC when I have faced a problem too difficult for me to resolve: I have asked Justice Margot Botsford for help. Justice Botsford will offer the Chief Justices the fresh perspective of an informed outsider, and I am deeply grateful that she has agreed to do so in her supposed retirement, pro bono. She is already hard at work speaking with judges, probation officers, staff, and attorneys, and she will work with Chief Justice Carey, Chief Justice Ordoñez, and others in an attempt to reimagine the delivery of justice to make it less burdensome for judges and more effective for litigants. I do not know how this journey will end, but I am confident, knowing the extraordinary talent of those making this journey, that by next fall we will be well underway in rethinking how we do justice in the Probate and Family Court.

The second challenge we face is the shortage of available attorneys to represent parents and children in care and protection cases when the Department of Children and Families has removed a child from parental custody. The number of these care and protection cases jumped by 45% from Fiscal Year 2013 to Fiscal Year 2016. As a matter of statute, the parents and child are entitled to an evidentiary hearing within 72 hours of the removal of custody to determine whether DCF's temporary custody of the child will continue until the matter is finally resolved,

and each parent and child is entitled, if he or she is indigent, to individualized representation by an attorney at that hearing.<sup>8</sup> The judges of the Juvenile Court stand ready to hear these cases and protect the rights of children and families, but too often we lack the attorneys needed to proceed with the 72-hour hearing within the required 72 hours; in Hampden County, since March of this year, approximately half of these 72-hour hearings have had to be continued because we could not find attorneys to represent all the necessary parties; and other counties are facing similar difficulties in finding counsel to take these cases, albeit not to the same extent as Hampden County. As a result, parents and children are being denied their statutory right to a timely adversarial evidentiary hearing regarding a matter that affects a vital liberty interest -- a parent's right to retain custody of his or her child. I created a committee last fall, led by former Chief Justice Roderick Ireland and Chief Justice Carey, that brought together the leadership of CPCS, the Juvenile Court, and DCF, as well as legislative leaders, in an effort to address this problem, and they have worked diligently to attempt to encourage more attorneys to be trained and willing to perform this important work. But the problem so far has eluded resolution, and may even be growing worse. It is time to recognize this for what it is -- a constitutional emergency; we simply cannot continue to allow so many parents and children to be denied their right to a timely 72-hour hearing. We need CPCS and the bar to find new ways to encourage and train more attorneys to do this work, especially in Western Massachusetts. We need our law schools to provide courses and clinical training in family law, and to encourage law students to take advantage of these opportunities so that they are ready, once they pass the bar, to take on this work. And, although I recognize the fiscal challenges we face, I ask the Legislature to consider increasing the hourly rate for CPCS bar advocates who represent parents and children in family law cases from \$55 to \$80 so that more attorneys can afford to do this work.

I have covered many different topics this afternoon, but there is one overriding theme that unites them all: our ongoing effort as a court system to rethink how to make the legal process fairer, more efficient, and more effective in solving the problems of the people who come before us. "Human progress is neither automatic nor inevitable," Dr. Martin Luther King once said. "Every step toward the goal of justice requires . . . the tireless exertions and passionate concern of dedicated individuals."<sup>9</sup> If we are willing to focus less on how we have always done our work, and more on how we can best provide justice and lighten the burdens of those who come to our courts, if we are willing to listen, to learn, to collaborate, to innovate, to evaluate, and to adapt, we can make the highest and best use of the many tireless, passionate, and dedicated individuals in our judiciary who are so committed to serving the people of this Commonwealth.

I now yield the podium to two of those tireless, passionate, and dedicated individuals, first, Chief Justice Paula Carey, and then Court Administrator Jon Williams.

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<sup>1</sup> Data Brief: Opioid-Related Overdose Deaths Among Massachusetts Residents, Massachusetts Department of Public Health, August 2017, <https://www.mass.gov/files/documents/2017/08/31/data-brief-overdose-deaths-aug-2017.pdf>.

<sup>2</sup> Hon. Edward F. Hennessey, *The State of the Judiciary*, 65 *Mass. L. Rev.* 104, 109 (May-June 1980).

<sup>3</sup> Justice Reinvestment in Massachusetts: Third Presentation, Council of State Governments Justice Center (July 12, 2016) at 24, <https://csgjusticecenter.org/jr/massachusetts/publications/justice-reinvestment-in-massachusetts-third-presentation/>.

<sup>4</sup> *Id.* at 30.

<sup>5</sup> Adrian Walker, *The formerly incarcerated still struggle to find work*, *Boston Globe*, Mar. 22, 2017, at <https://www.bostonglobe.com/metro/2017/03/21/years-after-criminal-justice-reform-formerly-incarcerated-struggle-find-work/0UkQxfESA7zGgnNO8TtuL/story.html>.

<sup>6</sup> *No Time to Wait: Recommendations for a Fair and Effective Criminal Justice System*, Boston Bar Association Criminal Justice Reform Working Group, September 2017, at 2.

<sup>7</sup> See G. L. c. 208, § 53.

<sup>8</sup> See G. L. c. 119, §§ 24, 29.

<sup>9</sup> Martin Luther King, *Address at the Thirty-fourth Annual Convention of the National Bar Association*, August 20, 1959, Milwaukee, WI, <https://kinginstitute.stanford.edu/king-papers/documents/address-thirty-fourth-annual-convention-national-bar-association>.